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No. 96-643

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
vs. *Petitioner,*
CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11001 et seq., requires large industrial facilities to file annual reports providing details about their use and release of toxic chemicals. The questions presented are:

1. Whether EPCRA authorizes a citizen suit against a party who failed to file the required reports for several years, then filed out-of-time reports only after receiving notice of the plaintiff's intent to sue but before the suit was brought.

2. Whether Article III bars Congress from permitting a citizen suit in such circumstances by plaintiffs who live near and are affected by the facility, and who expended resources to obtain independently the information that should have been supplied in the reports.

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**On Writ of Certiorari to the United States Court of
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BRIEF FOR THE RESPONDENT

STATEMENT

A. The Emergency Planning and Community Right-to-Know Act

1. The Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§ 11001 et seq., is widely regarded as one of the nation's most successful environmental statutes.¹ Unlike many environmental statutes, EPCRA does not impose "command-and-control" obligations on firms in an effort to compel pollution reductions through technological requirements or uniform emissions limitations. Instead, EPCRA is purely an informational statute. "The underlying premise of EPCRA is that the public has a right to know

¹ See, e.g., Hearne, *Tracking Toxics: Chemical Use and the Public's "Right-to-Know,"* 38 *Environment* 4,4 (1996) ("Industry, government, and community representatives alike consider" the central disclosure provision of EPCRA to be "one of the most successful environmental laws in U.S. history."); Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 *J. Land Use & Env. L.* 217 (1996); R. Percival et al., *Environmental Law and Policy* 650-53 (2d ed. 1996); P. Menell and R. Stewart, *Environmental Law and Policy* 424 (2d ed. 1992); Pildes & Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 106 (1995). Indeed, even petitioner acknowledges that EPCRA has proved effective. Pet. Br. 6.

about the toxic chemicals released by facilities in their communities.”² EPCRA seeks to achieve its environmental goals not through regulatory mandates but through the disclosure of polluting activity.³

Section 312 of EPCRA, 42 U.S.C. § 11022, imposes inventory requirements. Specifically, facilities using threshold amounts of certain specified toxic chemicals must submit, by March 1 of each year, an inventory of those chemicals to the local fire department and to state and local emergency planning commissions. The report must identify the chemicals on the site, the amounts used during the previous year, and the location of the chemicals on the site.

Section 313 of EPCRA, 42 U.S.C. § 11023, principally concerns releases of toxic chemicals. It provides that manufacturing facilities using threshold amounts of toxic chemicals must, by July 1 of each year, submit a form reporting any releases of those chemicals to the Administrator of the Environmental Protection Agency (EPA) and to a designated state official. These reports must include the volume of chemicals released, how releases in one year compare to the amounts released in previous years, projections of future releases, and recycling efforts.

All these reports must be made available for inspection by members of the public, and EPCRA requires local emergency planning agencies to notify members of the public that these reports are available by “publish[ing] a notice in local newspapers” (42 U.S.C. § 11044(b)). Section 313 specifically states that “the release forms required under this section are intended to provide information” not only “to Federal, State, and local governments” but to “the public, including citizens of communities surrounding covered facilities.” 42 U.S.C. § 11023(h). Members of the public use this information to help formulate local emergency response plans (42 U.S.C. § 11001(c)). In addition, Section 313 requires the Administrator “to

² General Accounting Office, *Toxic Chemicals: EPA's Toxic Release Inventory Is Useful but Can Be Improved* 32 (June 1991) [hereinafter GAO Report].

³ Some have discerned a general trend in environmental regulation away from command and control regulation and toward laws like EPCRA. See, e.g., R. Percival et al., *Environmental Law & Policy* 636-54, 825-834; P. Menell and R. Stewart, *Environmental Law and Policy* 415-27.

establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section.” 42 U.S.C. § 11023(j). The Administrator must “make these data accessible by computer telecommunication and any other means to any person.” *Ibid.*

The toxic releases inventory has been widely used, and it is credited with significantly reducing the amount of pollution. See, e.g., GAO Report at 23-24. The overall effects of EPCRA have been dramatic: Reported releases of toxic chemicals by firms complying with EPCRA have been reduced nearly 46 percent since 1988.⁴

2. The success of EPCRA depends entirely on timely and accurate reporting, and as with any self-reporting scheme, the rate of compliance is a concern under EPCRA. The Act specifies that “[a]ny person * * * who violates any requirement of section [312 or 313] * * * shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation.” 42 U.S.C. § 11045(c)(1). But according to some estimates, over 30% of the facilities that should have submitted reports under EPCRA have not done so, partly because of the limitations of government enforcement efforts. GAO Report at 49. The EPA, for example, which is the federal agency charged with enforcement of EPCRA, not only has limited resources but has enforcement responsibilities under many other important environmental statutes. In response to these concerns, Congress included a citizen suit provision in EPCRA. See, e.g., 131 Cong. Rec. 34650 (Dec. 5, 1985) (statement of Rep. Glickman) (“In view of the government’s limited and overburdened enforcement authority, citizen suits are essential to assure compliance with the law.”); H.R. Rep. 253, 99th Cong., 1st Sess., pt. 5, at 83 (Nov. 12, 1985).

Section 326 of EPCRA, the citizen suit provision, states that “any person may commence a civil action on his own behalf against * * * [a]n owner or operator of a facility for failure to * * * [s]ubmit an

⁴ Environmental Protection Agency, 1995 Toxics Release Inventory Public Data Release (May, 1997). This document is available at <http://www.epa.gov/opptintr/tri/pdr95/drover01.htm>.

inventory form under section [312]" or "for failure to * * * [s]ubmit a toxic chemical release form under section [313]." 42 U.S.C. § 11046 (a)(1)(A)(iii) and (iv). Section 326 provides that, before suing, a plaintiff must give 60 days' "notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator" (42 U.S.C. § 11046(d)(1)). No citizen suit may be brought "if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act with respect to the violation of the requirement" (42 U.S.C. § 11046(e)). If the plaintiff prevails in a citizen suit, the court may "enforce the requirement concerned and * * * impose any civil penalty provided for violation of that requirement." 42 U.S.C. § 11046(c). The court may also award "costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C. § 11046(f).

B. The Proceedings Below

Petitioner operates a manufacturing plant on the Southeast Side of Chicago, Illinois. As part of its operations, petitioner removes rust from steel coils, a process called steel pickling. This process involves the use of hydrochloric acid, an extremely hazardous toxic chemical. 40 C.F.R. Part 355, App. A & B. Users of hydrochloric acid are subject to the reporting requirements of Sections 312 and 313 of EPCRA. Petitioner had on its premises other hazardous substances covered by Section 312 as well. J.A. 6-7; Pet. App. A7-A8; Pet. Br. 4.

Between 1988 and 1995, petitioner, by its own admission, did not file the reports required by Sections 312 and 313 of EPCRA. Pet. App. A8; see J.A. 7-10. During that period, petitioner not only had toxic chemicals on its premises but released literally tons of such chemicals into the environment. In one year, for example, it released 130,618 pounds of hydrochloric acid into the air.⁵

⁵ See The Steel Company's Reply Memorandum in Support of Its Motion to Dismiss, No. 95 C 4534 (N.D. Ill.), filed Oct. 19, 1995, Exh. B.

Respondent Citizens for a Better Environment (CBE) is a not-for-profit corporation with offices in Illinois, Minnesota, and Wisconsin. It has approximately 30,000 members, many of whom live in the Chicago area. J.A. 4. The complaint describes CBE's membership as follows (J.A. 5):

Members of CBE reside, own property, engage in recreational activities, breathe the air, and/or use areas near [petitioner's] facility. * * * CBE's members seek, acquire, and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work, and visit.

On March 16, 1995, CBE gave notice to petitioner and to state and federal authorities that it believed petitioner had violated Sections 312 and 313 of EPCRA and that it intended to bring suit. J.A. 13-16. This notice was the product of an investigation of petitioner prompted by, among other things, a report from a member of the public that petitioner released "acidic material" through its smokestacks "only at night."⁶ After petitioner received CBE's notice it filed overdue forms with the appropriate agencies. Pet. App. A8. The EPA did not institute proceedings against petitioner, and on August 7, 1995, CBE filed this citizen suit under Section 326 of EPCRA in the United States District Court for the Northern District of Illinois. CBE sought, among other things, a declaratory judgment that petitioner had violated Sections 312 and 313; civil penalties, as provided by Sections 325 and 326; an injunction authorizing CBE to inspect petitioner's facility and records to ensure compliance with EPCRA; and an award of all costs incurred in connection with the investigation and prosecution of the case. J.A. 11.

Petitioner moved to dismiss the complaint on the ground that "CBE cannot sue it for failure to file timely EPCRA reports in the past, but only may sue to force [petitioner] actually to complete and submit

⁶ See Plaintiff's Memorandum in Opposition to "Motion to Dismiss," No. 95 C 4534 (N.D. Ill.), filed Oct. 5, 1995, Exh. 1 (Affidavit of Stefan A. Noe).

any EPCRA reports from 1988 to 1995 that it may have failed to file." Pet. App. A21. The district court agreed with petitioner and dismissed the complaint. Pet. App. A17-A26. The district court acknowledged that numerous decisions of lower courts had rejected petitioner's interpretation of EPCRA. Pet. App. A21-22, citing *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 751-53 (W.D.N.Y. 1991); *Williams v. Leybold Technologies, Inc.*, 784 F. Supp. 765, 768 (N.D. Cal. 1992); *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F.Supp. 1132, 1141 (E.D. Pa. 1993). See also *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972 (D. Ariz. 1996); *Idaho Sporting Congress v. Computrol*, 952 F. Supp. 690 (D. Id. 1996); *Neighbors for a Toxic Free Community v. Vulcan Materials Co.*, 1997 U.S. Dist. LEXIS 7025 (No. 95-D-2617) (D. Colo. April 25, 1997). But the district court chose instead to rely on the single lower court decision that had accepted petitioner's interpretation, *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995).

The court of appeals reversed. Pet. App. A1-A15. The court relied on the plain language of Section 326, the citizen suit provision of EPCRA. Section 326 provides that a citizen suit may be brought "for failure to * * * [c]omplete and submit an inventory form under section [312]" and "for failure to * * * [c]omplete and submit a toxic chemical release form under section [313]." The court explained that "[t]he most natural reading of 'under' a section is 'in accordance with the requirements of' that section." Pet. App. A11. While petitioner had, by the time suit was brought, belatedly filed the forms, petitioner had failed to file the forms by the deadlines specified in Sections 312 and 313; the court of appeals accordingly concluded that petitioner was guilty of a "failure to [c]omplete and submit" forms "under" those provisions within the meaning of the citizen suit provision.

The court of appeals also relied on the contrast between the citizen suit provision of EPCRA and the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1251 et seq., which was interpreted by this Court in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). The Clean Water Act provides that a citizen suit can be

brought only against a person "alleged to be in violation of" the Act. 33 U.S.C. § 1365(a)(1). Accordingly, this Court ruled that a complaint could not be brought under the citizen suit provision unless it alleged a "continuous or intermittent violation" (484 U.S. at 64); a party who had violated the Clean Water Act, but who came into compliance before the suit was brought, could not be "alleged to be in violation" and would accordingly not be subject to a citizen suit. By contrast, the court of appeals explained, EPCRA did not require that a citizen suit allege a defendant "to be in violation"; it required only a "failure" to file "under" the statute. Pet. App. A9-A12. The court of appeals accordingly concluded that EPCRA reached a defendant who filed delinquent reports in response to the notice to sue, but before the complaint was filed.

SUMMARY OF ARGUMENT

I. A. 1. The plain language of the citizen suit provision of EPCRA authorizes CBE's suit. EPCRA authorizes a citizen suit against an owner or operator of a facility for "failure to * * * [c]omplete and submit an inventory form under section [312]" and for "failure to * * * [c]omplete and submit a toxic chemical release form under section [313]." Petitioner is guilty of a "failure to do" these things. A form has not been "complete[d] and submit[ted] * * * under" a statutory provision when the individual submitting the form ignored the deadlines that the provision specifies—any more than a form could be said to have been submitted "under" Section 312 or 313 if it provided inaccurate data or disregarded some other requirement of that section. In fact, the deadlines specified in those provisions are among the most essential requirements in EPCRA. Information supplied years out of time is nearly worthless to the individuals and agencies to whom Congress wanted EPCRA data to be provided—local fire departments and emergency planning officials, and citizens who are concerned about environmental hazards in their neighborhoods.

2. This Court's decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), on which petitioner relies heavily, in fact reinforces the conclusion that EPCRA authorizes CBE's citizen suit. *Gwaltney* disallowed a citizen suit under the Clean Water Act in circumstances parallel to those present here. But the Court in

Gwaltney relied on the language of the Clean Water Act, which permits a citizen suit only against a person "who is alleged to be in violation" of an effluent standard. In EPCRA, Congress did not require a citizen plaintiff to allege that the defendant was "in violation" of the statute. Since every other environmental statute with a citizen suit provision contains the "alleged to be in violation" limitation, Congress's decision not to impose such a limit on EPCRA citizen suits cannot be attributed to inadvertence.

B. In fact, Congress had good reason to choose different language when it drafted the citizen suit provision of EPCRA: petitioner's interpretation would effectively nullify the citizen suit provision of EPCRA. Because EPCRA is an informational statute, a firm will seldom find it difficult to come into compliance with EPCRA within 60 days after receiving notice of a citizen's intent to sue. *Gwaltney* left a substantial role for citizen enforcement of the Clean Water Act: a firm that is in violation of an anti-pollution requirement might have to modify its manufacturing processes or install new equipment, costly tasks that will often take more than 60 days. But a firm that has been ignoring Sections 312 and 313 of EPCRA—or, for example, a firm that does not update its forms and inaccurately reports the same information year after year—will almost always be able to file delinquent, corrected forms within 60 days of receiving notice of intent to sue. Under petitioner's interpretation of EPCRA, such a firm would then be immune from citizen enforcement. Congress could not have intended to permit the elaborate citizen suit provision of EPCRA to be set completely at naught in this way.

II. Article III does not bar CBE's citizen suit. This suit is, as we have shown, authorized by an Act of Congress. It is a suit against a private party, not against an executive official, and therefore does not present separation of powers problems involving judicial supervision of the executive. There is no question that CBE and its members were injured in fact, and that the injury was inflicted by petitioner. And in numerous ways, the relief CBE seeks will redress its and its members injuries. The Court has consistently recognized that Congress may authorize qui tam actions seeking, as this suit does, the payment of a fine to the Treasury; CBE has an even stronger claim to standing than the typical qui tam plaintiff, because CBE was undoubtedly injured in fact.

A. As a result of petitioner's conduct, CBE and its members suffered injury in fact in several forms. First, petitioner denied them the information that EPCRA gives them a right to receive. In this respect, CBE and its members are not just asserting an interest they share with the general public. CBE's members live and work near petitioner's facility, and EPCRA is particularly designed to ensure that individuals living near facilities that use and release toxic chemicals have accurate and timely information.

In addition, because petitioner did not comply with EPCRA, CBE had to expend its own resources to uncover information about petitioner to supply to members of the community. Finally, Congress expected that firms that complied with EPCRA would be likely to pollute less, and petitioner's conduct bears out Congress's judgment: petitioner's reported releases of hydrochloric acid dropped dramatically after it began filing EPCRA reports. The additional environmental injury that petitioner inflicted on the surrounding community, during the time it was ignoring EPCRA, is further injury in fact.

B. CBE's suit also satisfies the requirement of "redressability." There would be no conceivable issue about redressability in this case had petitioner not begun complying with EPCRA when it received CBE's notice of intent to sue. But it is well established that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Northeastern Florida Chapter, Associated General Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993) (citation omitted). That principle is usually applied when the voluntary cessation occurs after suit is brought. Nothing in Article III, however, prohibits Congress from applying the same principle in a case like this, when the voluntary cessation was a response to the notice of intent to sue, and when Congress had compelling reasons not to permit the citizen enforcement scheme to be nullified in this way.

In addition, the relief CBE seeks redresses its injury by punishing petitioner for wrongful conduct and by deterring future wrongful conduct by petitioner. In particular, Congress was entitled to conclude that petitioner would be less likely to violate EPCRA in the future—thus inflicting further injury on CBE and its members—if petitioner had been punished for past violations. This suit also seeks

compensation for some of the injury petitioner inflicted on CBE and its members. The award of litigation costs will include compensation to CBE for the costs of the investigation it was forced to undertake to learn about petitioner's use of toxic chemicals. The possibility of a settlement, through a Supplemental Environmental Project, can remedy some of the environmental injury petitioner inflicted on CBE members.

ARGUMENT

I. EPCRA AUTHORIZES A CITIZEN SUIT AGAINST A DEFENDANT WHO FILES OUT-OF-TIME REPORTS AFTER RECEIVING THE NOTICE OF INTENT TO SUE

A. The Plain Language Of The Citizen Suit Provision Authorizes This Action.

1. The interpretation of the citizen suit provision of EPCRA must, of course, "begin * * * with an examination of the language of the statute." *Ingalls Shipbuilding Inc. v. Director, OWCP*, 117 S. Ct. 796, 801 (1997); see, e.g., *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). Section 326 of EPCRA authorizes a citizen to bring suit against "[a]n owner or operator of a facility for failure to do" certain specified things. Among those things are "failure to * * * [c]omplete and submit an inventory form under section [312]" and "failure to * * * [c]omplete and submit a toxic chemical release form under section [313]." 42 U.S.C. § 11046(a)(1)(A)(iii) and (iv).

Petitioner is guilty of a "failure to do" these things. Of course, petitioner filed out-of-time forms for previous years, after it had received notice of CBE's intention to sue. But this did not constitute "complet[ing] and submit[ting the forms] under" Sections 312 and 313. The ordinary meaning of "under" a legal provision is "in accordance with" that provision,⁷ and a form cannot be said to have been "complete[d] and submit[ted] * * * under" a statutory provision when the individual submitting the form ignored the deadlines that the provi-

⁷ See, e.g., Webster's Encyclopedic Dictionary, Unabridged Edition (1989), which defines "under" as "14. in accordance with: *under the provisions of law*."

sion specifies—any more than a form could be said to have been submitted "under" Section 312 or 313 if it disregarded some other requirement of that section. As the court of appeals explained, this use of "under" is "simply a way to incorporate the requirements of the referenced section without listing them all over again." Pet. App. A11.

Section 312 provides that "[t]he inventory form * * * shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year." 42 U.S.C. § 11022(a)(1). Petitioner filed no such forms on March 1 of 1988 through 1995. Section 313 specifies that "a toxic chemical release form * * * shall be submitted * * * on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year." 42 U.S.C. § 11023 (a). Petitioner filed no such forms on July 1 of 1988 through 1994. Forms submitted years after those deadlines cannot be said to have been filed "under" Sections 312 and 313.

No one would deny that petitioner had "fail[ed] to * * * [c]omplete and submit an inventory form under section [312]" or Section 313 if petitioner had filed forms that omitted the information required by those sections, such as the identity and quantity of the chemicals. But there is simply no principled basis for distinguishing between the deadlines specified in Section 312 and 313 and the other requirements of those sections. That is why petitioner—whose brief devotes conspicuously little attention to the plain language of Section 326—cannot suggest any plausible explanation of why an untimely filing would not be a "failure to complete and submit" a form "under" Sections 312 and 313.

Petitioner asserts that "[t]he reference to complete and submit forms 'under' Sections 312 and 313 is simply that—a reference to Section 312's inventory form and Section 313's Form R—not a wholesale incorporation of those sections' requirements." Pet. Br. 31-32. But petitioner surely does not deny that filing blank forms, or forms containing information that the owner knew to be inaccurate, would constitute a "failure to complete and submit forms under" Sections 312 and 313. And petitioner does not explain why the requirements of accuracy are "incorporated" but the deadlines speci-

fied in Sections 312 and 313 are not.

In fact, the deadlines specified in those provisions are among the most essential requirements in EPCRA. The information required by EPCRA is far less valuable when it is disclosed belatedly, especially years after it was required. That is apparent from the fact that Congress required annual disclosures. Congress would not have done so if outdated information was as useful as current information.

In addition, EPCRA's specific purposes are served only if information is kept current. For example, forms required under Section 312, specifying the amounts and locations of hazardous chemicals, are filed with the local fire department and local emergency planning agencies. Those officials obviously need current information to plan how to control fires or releases of hazardous chemicals. A form filed years late is of little or no use to them. The same is true for citizens living or raising children in the neighborhood of a facility that uses toxic chemicals, or persons considering whether to buy property in such a neighborhood. In all of those instances, the information required by EPCRA is far less valuable—and may well be altogether useless—if it is disclosed years late. There is, accordingly, no basis whatever, in either the language or the logic of EPCRA, for concluding that a failure to comply with the deadlines specified by Sections 312 and 313 is not actionable in a citizen suit.

2.a. Petitioner relies heavily on this Court's decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). *Gwaltney* held that the citizen suit provision of the Clean Water Act did not authorize a suit against a firm that was in violation of a permit condition when it received notice of intent to sue, but that came into compliance before suit was brought. *Gwaltney*, however, far from supporting petitioner, powerfully reinforces the conclusion that EPCRA authorizes this action. That is because the citizen suit provision of the Clean Water Act is phrased differently from EPCRA's, and the difference is crucial.

The Clean Water Act authorizes an citizen suit "against any person * * * who is alleged to be in violation of" an effluent standard. 33 U.S.C. § 1365(a) (emphasis added). The Court explained in *Gwaltney* that "[t]he most natural reading of 'to be in violation' is a requirement

that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57.

Had Congress wanted to limit citizen suits under EPCRA in the way petitioner advocates, Congress could simply have borrowed the phrase "alleged to be in violation" from the Clean Water Act. But there is overwhelming evidence that Congress deliberately chose *not* to use that phrase in EPCRA. Every other citizen suit provision in an environmental statute at the time of EPCRA used the phrase "alleged to be in violation." As the Court explained in its most recent decision dealing with a citizen suit provision, the language in a statute must be "compared with the language Congress ordinarily uses." *Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997). In EPCRA, Congress used different language from what it used in every other citizen suit provision.

In fact, the citizen suit provision of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659, is limited by the "alleged to be in violation" formulation—and the CERCLA citizen suit provision was enacted as part of the same public law as EPCRA. Pub. Law 99-499 (Oct. 17, 1986). "[I]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994), quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (brackets in original).

⁸ See Clean Water Act, 33 U.S.C. § 1365 (1972); Marine Protection Research & Sanctuaries Act, 33 U.S.C. § 1415(g) (1972); Noise Control Act, 42 U.S.C. § 4911 (1972); Endangered Species Act, 16 U.S.C. § 1640(g) (1973); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1974); Deepwater Port Act, 33 U.S.C. § 1515 (1975); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(A) (as amended 1984); Toxic Substances Control Act, 15 U.S.C. § 2619 (1976); Surface Mining Control & Reclamation Act, 30 U.S.C. § 1270 (1977); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1978); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9659 (1986); Hazardous Liquid Pipeline Safety Act, 42 U.S.C. § 2014. RCRA contains an additional citizen suit provision that does not use the term "alleged to be in violation," but that provision, also, focuses on ongoing harm. See 42 U.S.C. § 6972(a)(1)(B).

Against this background, the obvious inference is that Congress used the distinctive language of the citizen suit provision of EPCRA because it wanted to do something different in EPCRA: Congress's decision to deviate, in EPCRA, from "the language it ordinarily uses" in citizen suit provisions (*Bennett*, 117 S. Ct. at 1162) establishes that Congress did not want to require citizens suing under EPCRA to "allege[the defendant] to be in violation" of the Act at the time of the suit. In *Gwaltney*, the Court emphasized that the phrase "'alleged to be in violation' [i]s a statutory term of art rather than a mere stylistic infelicity" (484 U.S. at 62). Congress's decision *not* to use that "term of art" also should not be viewed as a mere stylistic variation.

Petitioner, again, has no plausible explanation for Congress's decision to use the phrase "failure to * * * [c]omplete and submit [forms] under" Sections 312 and 313 instead of the customary "alleged to be in violation." Petitioner's only suggestion appears to be that because Sections 312 and 313 require only the filing of documents, the use of the term "violation" would somehow be inapposite. See Pet. Br. 31. But this argument, implausible on its face, is contradicted by the text of EPCRA itself. The provisions of EPCRA specifying civil penalties refer to a failure to comply with Section 312 or 313 as a "violation." 42 U.S.C. § 11045(c)(1). Moreover, those provisions show that Congress's understanding in EPCRA, too, was that a "violation" of a reporting requirement "continues" until the report is filed out of time, at which point the "violation" ceases. See 42 U.S.C. § 11045(c)(3).⁹ The phrase "to be in violation" would, therefore, have had a clear meaning under EPCRA—the very meaning that petitioner wishes to impute to the citizen suit provision. Congress, however, chose not to use that phrase.

⁹ Under these provisions, a failure to submit a required report under Section 312 or 313 renders a person liable for a civil penalty of up to \$25,000 "for each violation," and "[e]ach day a violation * * * continues shall, for [these] purposes * * * constitute a separate violation." 42 U.S.C. § 11045(c)(1), (3). Thus the term "violation" under EPCRA denotes a state of affairs that can be brought to an end by filing an out-of-time report.

b. In other ways, as well, the logic of *Gwaltney* not only is inapplicable to EPCRA but helps show that EPCRA authorizes CBE's suit in this case. The Court in *Gwaltney* remarked on the "undeviating" and "pervasive use of the present tense" in the citizen suit provision of the Clean Water Act—usage that, the Court believed, further suggested that citizen suits were limited to unlawful conduct that was ongoing at the time suit was filed. 484 U.S. at 59. Section 326 of EPCRA stands in sharp contrast. The term "failure," of course, is not taken most naturally to refer to ongoing action but to action in the past. Also, the venue provision for citizen suits under EPCRA, Section 326(c), provides that citizen suits "shall be brought in the district court for the district in which the alleged violation *occurred*." 42 U.S.C. § 11046(c) (emphasis added). This, of course, suggests that citizen suits may be brought for violations that were completed by the time the suit was filed.

Similarly, *Gwaltney* found "most telling" the definition of a citizen authorized to bring suit under the Clean Water Act: "'a person . . . having an interest which is or may be adversely affected' by the defendant's violations of the Act." 484 U.S. at 59, quoting 33 U.S.C. § 1365 (g). The Court reasoned that this limitation on the class of individuals authorized to sue revealed that Congress intended to allow citizen suits only against ongoing violations. Under the citizen suit provision of EPCRA, by contrast, "*any person* may commence a civil action" (42 U.S.C. § 11046(a)(1) (emphasis added)). This Court has recently commented on the "remarkable breadth" of the "any person" formulation, contrasting it explicitly to "the language Congress ordinarily uses" in citizen suit provisions. *Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997). These aspects of EPCRA are further evidence that the approach taken in *Gwaltney*, when applied to EPCRA, leads not to the result petitioner suggests but to the conclusion that CBE's suit should be allowed.

There are other differences, as well, between the Clean Water Act citizen suit provision considered in *Gwaltney* and Section 326 of EPCRA. The legislative history of the Clean Water Act contained numerous statements suggesting that the citizen suit provision was intended only to abate or prevent pollution. See 484 U.S. at 61-63. The legislative history of EPCRA contains nothing comparable. In

addition, the Court in *Gwaltney* was concerned that citizen suits under the Clean Water Act might interfere with EPA efforts to settle an administrative enforcement proceeding. See 484 U.S. at 60-61. But under EPCRA, EPA's initiation of administrative enforcement proceedings bars a citizen from filing suit. 42 U.S.C. § 11046(e).

There is, to be sure, one conspicuous use of the present tense in Section 326. But far from aiding petitioner, it wholly undermines one of petitioner's principal arguments. The notice provision of Section 326 requires that the citizen plaintiff give notice to, among others, "the State in which the alleged violation *occurs*" (42 U.S.C. § 11046(d)(1) (emphasis added)). This is in direct contrast to the venue provision, according to which citizen suits "shall be brought in the district court for the district in which the alleged violation *occurred*." 42 U.S.C. § 11046(c) (emphasis added). The most reasonable inference from this contrast is that the violation must be ongoing at the time notice is given—but need not be ongoing at the time suit is brought. That is, of course, precisely the situation here.

Petitioner raises the spectre that citizen plaintiffs will "exhume past violations" by "search[ing] old government records to determine which companies filed late EPCRA reports and then su[ing.]" Pet. Br. 47. Of course, that is not what this case involves, and the Court need not reach the question whether EPCRA permits such citizen suits. But in any event, the contrast in tenses between the venue and notice provisions provides a firm basis for distinguishing this suit from any such "exhumation." And nothing in EPCRA suggests that a firm that files overdue forms only in response to the notice of intent to sue can thereby gain immunity from a citizen action.

3. Petitioner places its greatest emphasis on the fact that Section 326 contains a notice requirement. See Pet. Br. 14-20. Petitioner relies on the Court's conclusion in *Gwaltney* that the notice provision of the Clean Water Act was intended to provide polluters an opportunity to come into "complete compliance" with that Act and thereby "render unnecessary a civil suit." 484 U.S. at 60. In the context of a statute like the Clean Water Act, which authorizes citizen suits *only* against defendants "alleged to be in violation," this is undoubtedly one purpose to which the notice period might be put.

Petitioner's argument, however, presupposes that this is the only purpose of the notice period. Congress's actions in amending another citizen suit provision—that found in the Clean Air Act, 42 U.S.C. § 7604—demonstrate that this presupposition is false. At the time of *Gwaltney*, the Clean Air Act authorized citizen suits only against persons "alleged to be in violation" (42 U.S.C. § 7604(a) (1982)). In 1990, Congress added a provision allowing citizen suits in certain circumstances against any person "who is alleged to have violated" the Act. 42 U.S.C. § 7604(a)(1),(3). This made it clear that citizen suits could be brought even for violations that had entirely ceased by the time of the suit.

When Congress made this change, however, it did not remove the notice requirement. See 42 U.S.C. § 7604(b). If petitioner's argument were correct—that the only reason for a notice requirement is to permit a violator to come into compliance and avoid being sued—the notice requirement of the amended Clean Air Act would have been pointless. Congress obviously did not regard it as such. This establishes that the notice period must have other purposes besides allowing potential defendants to cease their violations.

Petitioner asserts (Pet. Br. 20) that Congress would have amended EPCRA, just as it amended the Clean Air Act, if it wished *Gwaltney* not to apply to EPCRA. But of course Congress had no reason to believe that EPCRA needed to be amended. The language of EPCRA was, as we have explained, entirely different from the language that the Court construed in *Gwaltney*. In addition, until the Sixth Circuit's decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, *supra*, an unbroken series of lower court decisions construed EPCRA to permit citizen suits against defendants who ceased their violations only in response to the notice of intent to sue. See page 6, *supra*. Congress's decision to leave EPCRA unchanged therefore suggests, if anything, that it considered *Gwaltney* inapplicable to EPCRA. And its decision to amend the Clean Air Act, while leaving the notice period intact, demonstrates that the notice period serves other purposes besides enabling a violator to come into compliance.

That conclusion about the notice period is evident in any event. As this Court noted not only in *Gwaltney*, 484 U.S. at 59, but again in *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), one other purpose of the notice period is to allow the EPA to determine whether it wishes to bring an enforcement proceeding against the alleged violator, thereby barring a citizen suit. The notice period of EPCRA continues to serve this purpose under the approach taken by the court of appeals in this case.

More fundamentally, however, the notice period in citizen suit provisions serves the purpose that notice periods serve generally—they allow for a dispute to be settled before litigation begins. For example, Congress has provided for notice to be given to the prospective defendant even in cases in which only damages will be sought, such as under the Federal Tort Claims Act. See 28 U.S.C. § 2675(a). The purpose of that notice provision cannot possibly be to allow the defendant to come into compliance; it is obviously to allow for a settlement. The same purpose is served by the notice requirement of EPCRA.

A notice requirement is a particularly efficient way to serve this purpose in a statutory scheme like EPCRA, where the potential defendant has accurate and complete information about the existence of a violation of the law, and the plaintiff's information is very likely to be fragmentary. Ordinary citizens seldom have complete access to information about the use and storage, or even the release, of toxic substances at a private industrial plant. Citizen suits under EPCRA are very likely, as a result, to be based on inferences and extrapolations from publicly available data. The notice period enables the potential EPCRA defendant to provide additional information that might show that those inferences and extrapolations are incorrect, or that for some other reason a suit should not be brought. All of this can be done before suit is filed and positions begin to harden. Petitioner's principal argument, therefore—that the existence of a notice provision shows that EPCRA must bar suits like CBE's—is not plausible.

B. Petitioner's Interpretation Would Effectively Nullify The Citizen Suit Provision Of EPCRA.

Congress had good reason to choose different language when it enacted the citizen suit provision of EPCRA. *Gwaltney's* interpretation of the citizen suit provision of the Clean Water Act still leaves a substantial role for citizen enforcement. But the interpretation of EPCRA for which petitioner contends would effectively nullify Section 326. Petitioner asserts that citizen suit provisions in the various environmental statutes "resemble each other almost completely" (Pet. Br. 14) and that Section 326 of EPCRA should be interpreted in accordance with this supposed "customary citizen suit model." Pet. Br. 12. As we have shown, the language of the Section 326 directly contradicts this assertion. But beyond that, EPCRA is unlike other environmental statutes because it is strictly an informational statute. This fundamentally alters the way citizen suits function, and it explains why Congress used different language in EPCRA.

1. Because EPCRA is an informational statute, it is relatively easy for a firm to come into compliance with EPCRA on short notice. Compliance with EPCRA requires, so to speak, only paperwork—not (as often in the case of a statute like the Clean Water Act) the reengineering of manufacturing processes or the installation of new equipment. A firm that has been ignoring Sections 312 and 313 of EPCRA will almost always be able to submit all delinquent forms within 60 days after it receives notice of intent to sue. Under petitioner's interpretation of EPCRA, such a firm will then be immune from a citizen suit.

If petitioner prevails, therefore, the citizen suit provision of EPCRA will be effectively nullified in all but rare cases. Firms that receive notice from a potential citizen plaintiff will simply, as a matter of course, file the past-due forms within 60 days. This is especially so because, contrary to petitioner's suggestions, the filing

requirements of EPCRA are not particularly onerous; much of the information must already be gathered by firms for other purposes.¹⁰ See Pet. App. A4.

One might suppose that, if firms do come into compliance in this way, the purposes of EPCRA will have been achieved, and without litigation. But that is not so. EPCRA can be successful only if the information on file is accurate and up to date. Out-of-time filings, prompted only by the threat of litigation, will not serve EPCRA's purposes.

Moreover, it is difficult and time-consuming for citizens and citizen groups to try to identify private firms that are using toxic chemicals. Since citizen plaintiffs can recover fees only if they prevail in litigation, petitioner's interpretation of Section 326, if it were to prevail, would cause citizen groups to lose much of their incentive, and their financial ability, to engage in the investigations needed to identify firms that are ignoring their reporting obligations under EPCRA.

No doubt some level of investigation by citizen groups will continue, but it will be much reduced. Because nearly all defendants will come into compliance once they receive notice, citizen suits under Section 326 will become virtually unknown. In view of the importance Congress attached to citizen enforcement—and the well-known problems of enforcement that always plague self-reporting schemes, and that appear to afflict EPCRA as well—it is extremely unlikely that Congress intended these results. Congress's choice of distinctive language in Section 326, can, therefore, only be seen as authorizing—for this distinctive, informational statute—citizen suits for overdue reporting violations.

The contrast with statutes such as the Clean Water Act again illustrates why the distinctive language of the EPCRA citizen suit provi-

¹⁰ Petitioner's claims about how burdensome compliance with EPCRA is (Pet. Br. 42-43) are refuted by EPA's most recent Federal Register notice on the subject. See 62 Fed. Reg. 23834, 23889 (May 1, 1997) (forms required under Section 313 require an estimated average of 74 hours per report in the first year and 52.1 hours per report in subsequent years); See also Pet. App. A4 (Section 312 reports range in annual fixed costs from \$43.50 to \$146.81)

sion is so significant. Complying with the Clean Water Act will often involve substantial expense, and extensive changes in plant and equipment. This is especially so because, under *Gwaltney*, a defendant who has committed a violation can escape a citizen suit only by "demonstrat[ing] that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 484 U.S. at 66 (citation and emphasis omitted). It will be often be difficult for a firm that is "in violation" to meet that burden within sixty days.

Moreover, if a firm does come fully into compliance, it will often be reasonable to expect that—having already made the investment in modified processes or new equipment—the firm may not resume polluting once the threat of a citizen suit abates. By contrast, on petitioner's view of EPCRA, nothing in the citizen suit provisions prevents a defendant from filing past-due reports when it receives a notice of intent to sue, then simply ignoring EPCRA until it receives another such notice.

2. This aspect of EPCRA also further confirms the artificiality of petitioner's suggestion (Pet. Br. 31-32) that the deadlines specified in Sections 312 and 313 are different from the other requirements of those sections, so that a citizen suit can be brought only for a violation of the other requirements, not for a violation of the deadlines. If petitioner's interpretation of EPCRA were to prevail, firms could file forms, before the statutory deadlines, with any information they chose to supply. They could, for example, simply not update their forms from year to year—planning to update the forms if and when a potential citizen plaintiff discovered the violation and gave notice of intent to sue. So long as they filed corrected forms before suit was brought, they would be guilty of only an out-of-time filing and, under petitioner's approach, they could not be named in a citizen suit. In this way, a firm could use the loophole petitioner seeks to create—an immunity from citizen enforcement, so long as the firm comes "into compliance" within sixty days after its wrongdoing is discovered—to disregard any aspect of EPCRA's reporting requirements.

It is, of course, no answer to say that the government is available to enforce EPCRA against firms that engage in such actions. One thing that is clear—not only from the legislative history of EPCRA (see page 3, *supra*) but from the very existence of Section 326—is that

Congress did not intend to rely entirely on government enforcement. It envisioned an important role for citizen suits. As we have explained, such a role is consistent with *Gwaltney*. But Congress could not have intended the carefully-designed citizen suit provision of EPCRA to be set at naught by firms that take the simple expedient of filing once their violation of EPCRA are discovered.

II. ARTICLE III DOES NOT BAR CONGRESS FROM AUTHORIZING THIS CITIZEN SUIT

Although petitioner did not challenge CBE's standing in the court of appeals, petitioner now asserts that Article III bars this citizen suit, even if EPCRA authorizes it, because CBE lacks standing. Pet. Br. 34-41. Petitioner's cursory argument on this point gives no hint of how far-reaching its claim is, and of how much this case differs from any other in which this Court has found that the plaintiff lacked standing. To begin with, CBE's suit is, as we have shown, authorized by an Act of Congress, and it is extremely rare for this Court to rule that Congress has exceeded the bounds of Article III.¹¹

¹¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is arguably the only case in which this Court has done so. See R. Fallon, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 169-70 (4th ed. 1996). In *Muskrat v. United States*, 219 U.S. 346 (1911), the Court invalidated an Act of Congress on Article III grounds, but the Court's concerns appear to have been that the Act authorized the issuance of an advisory opinion and that the defendant had no stake in the case. See *id.* at 361. In *McClure v. Reagan*, 454 U.S. 1025 (1981), the Court summarily affirmed, without opinion, a district court decision denying standing to a member of Congress to challenge a judicial appointment. A special Act of Congress had purported to grant standing in those circumstances. See *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981).

In fact, there is a broad consensus in the academic literature that the question of standing should be viewed as identical to the question whether a statute or constitutional provision creates in the plaintiff a right to bring suit. See, e.g., Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 451-55 (1974); Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41; Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37; Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988); *id.* at 223 n. 18 (collecting authorities).

Perhaps more important, this is a suit against a private party, not against a government official or government agency. It therefore involves no effort "to transfer from the President to the courts the Chief Executive's most important Constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). The separation of powers is the "single basic idea" on which "the law of Art. III standing is built" (*Allen v. Wright*, 468 U.S. 737, 752 (1924)). This case—a lawsuit between two private parties, alleging a wrong in the past, and seeking primarily the payment of money—is manifestly a form of litigation that "is 'consistent with the separation of powers and * * * traditionally thought to be capable of resolution through the judicial process.'" *Allen v. Wright*, 468 U.S. at 752, quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

"To satisfy the 'case' or 'controversy' requirement of Article III, * * * a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 117 S. Ct. at 1163, citing *Defenders of Wildlife*, 504 U.S. at 560-61. It is beyond serious dispute that petitioner's admitted failure to comply with EPCRA inflicted injury on CBE, thus satisfying the "injury in fact" and "fairly traceable" elements of the standing inquiry. The requirement of "redressability," to the extent it applies in a suit of this kind, is satisfied in numerous ways: the award of civil penalties will punish petitioner for the injury it inflicted on CBE and its members and deter future injury to CBE and its members; and the award of litigation costs will compensate CBE for the cost of discovering information that would have been freely available, had petitioner not violated EPCRA.

A. CBE Suffered Injury In Fact Caused by Petitioner's Conduct

1. EPCRA's title itself identifies the injury inflicted by petitioner's conduct. EPCRA is intended to enforce a "right to know," that is, a right to information. By failing to file the required forms, petitioner deprived CBE and its members of information to which CBE was entitled. Under EPCRA, the information on Section 312 and 313 forms is made available to the public, and the public is notified of its availability. 42 U.S.C. §§ 11022(e), 11023(h). The information from

Section 313 forms is compiled in a computer database readily available to members of the public. See 42 U.S.C. § 11023(j). Had petitioner complied with EPCRA, both CBE and its members would have had access to information about petitioner's use and release of toxic chemicals. Because of petitioner's wrongdoing, they did not have access to that information.

There is no question that "injury to a statutorily created right to truthful * * * information" can constitute "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). See, e.g., *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989). But the injury inflicted on CBE and its members is even more "distinct and palpable" (*Warth v. Seldin*, 422 U.S. 490, 501 (1975)) than that. This is a case in which Congress has, with specificity, "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring).

That is because EPCRA is concerned not just with the public dissemination of information, but with making information available to a specific group: individuals who live and work near the facilities that use and release toxic chemicals. EPCRA was enacted partly in response to the accidental release of toxic chemicals in Bhopal, India, in which over 2,000 people were killed and countless injured in the surrounding area, and to a similar but less devastating release of toxic chemicals in Institute, West Virginia. See Pet. App. A2. Congress well understood that people living near industrial facilities that use toxic chemicals are most in need of the information that EPCRA compels the users of toxic substances to disclose, so that they can prepare for emergencies—a principal focus of EPCRA—and attempt to work with the industrial users of toxic substances to mitigate or eliminate the hazards.

This is explicit in the language of the statute itself: Section 313, one of the provisions that petitioner violated, states that "the release forms required under this section are intended to provide information" not only "to Federal, State, and local governments" but to "the

public, including citizens of communities surrounding covered facilities." 42 U.S.C. § 11023(h). It is reinforced by the legislative history of EPCRA. See, e.g., H. R. Rep. 962, 99th Cong., 2d Sess. 281, 299 (1986) (Conference Report) ("[EPCRA] establish[es] programs to provide the public with important information on the hazardous chemicals in their communities. * * * The information collected under [Section 313] is intended to inform the general public and the communities surrounding covered facilities about release of toxic chemicals"); H.R. Rep. 253, 99th Cong., 2d Sess. pt 1 at 59 (1985) ("The purpose of EPCRA is to provide the public with important information on hazardous chemicals in their communities.").

CBE's complaint specifically alleged that CBE members "reside, own property, engage in recreational activities, breathe the air, and/or use areas near [petitioner's] facility." J.A. 5. The complaint also states that CBE's members "seek, acquire, and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work, and visit." J.A. 5. Thus CBE and its members "ha[ve] suffered injury in precisely the form the statute was intended to guard against" (*Havens Realty Corp.*, 455 U.S. at 373): they are within a narrow, geographically-defined class of individuals to whom Congress gave a right to information about facilities like petitioner's—facilities in the immediate geographical area. The existence of injury in fact is, therefore, beyond serious question in this case.

2. While the denial of information is sufficient to establish injury in fact to both CBE and its members, petitioner also injured CBE in its organizational capacity (see, e.g., *Warth*, 422 U.S. at 511). Because petitioner failed to comply with EPCRA, CBE had to conduct an independent investigation to discover information about the chemicals used at petitioner's plant. As we have noted, CBE conducted such an investigation, based partly on a report from a member of the public to the effect that petitioner was releasing "acidic material" from its smokestacks at night. Instead of being able to obtain the information that petitioner should have disclosed under EPCRA, CBE had to examine a variety of other sources to try to discover evi-

dence about the kinds of chemicals that petitioner was storing and releasing.¹² The additional costs that CBE incurred in conducting that investigation—to obtain the very information that EPCRA requires petitioner to disclose—were a “drain on the organization’s resources” that, as the Court has held, constitutes a further injury in fact to the organization. *Havens Realty Corp.*, 455 U.S. at 379.

As the complaint alleges, CBE and its members systematically gather information on facilities in their neighborhood that use toxic chemicals and make that information available to people living nearby. CBE prepares, for example, a *Guide to Southeast Chicago’s Major Polluting Industries*, which is “designed to help southeast Chicago residents better understand the magnitude of the toxics threat with which they are living on a daily basis and to provide them with the information and some tools they can use to begin working proactively to reduce that threat.” *Id.* at 1.¹³ The listing of each firm specifies in detail the amounts and toxicity of the chemicals stored and released by each firm. The guide is compiled from forms filed under EPCRA. Petitioner’s facility would have been described in the most recent issue of the guide, and the information that Congress sought to make available to the surrounding neighborhood would have been available—had petitioner not violated EPCRA.

EPCRA, as we have said, was intended in large part to make readily available to individuals and groups precisely the kind of information CBE includes in its guide. But because petitioner ignored EPCRA’s requirements, CBE had to expend its own resources to conduct a much more expensive independent investigation, which culminated in its discovery that petitioner used and released toxic chemicals. This expenditure—precisely one of the things EPCRA sought to avoid—is additional injury in fact.

¹² See Plaintiff’s Memorandum in Opposition to “Motion to Dismiss,” No. 95 C 4534 (N.D. Ill.), filed Oct. 5, 1995, Exh. 1 (Affidavit of Stefan A. Noe).

¹³ A copy of this document has been lodged with the Clerk of the Court and served on counsel for petitioner.

3. Finally, there is reason to believe that petitioner’s failure to file reports under EPCRA was also responsible for greater pollution in the environment near its plant. One principal purpose of EPCRA was to induce firms that used toxic chemicals to learn about their own practices; another was to expose those firms to public opinion. Congress expected that the result would be less use of toxic chemicals and less pollution, and the history of EPCRA has dramatically borne out Congress’s judgment. See page 3, *supra*.

In fact, petitioner itself sharply reduced its releases of toxic chemicals after it began filing EPCRA reports. From 1988 to 1993, when petitioner was not filing its annual Section 313 reports, its hydrochloric acid air releases increased almost every year. For 1993, petitioner reported air emissions of 124,787 pounds of hydrochloric acid. For 1995—after this suit was brought—petitioner reported emissions of only 27,560 pounds.¹⁴ This makes it much more than “speculation” (*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976)) to say that compliance with EPCRA during the period from 1988 to 1995 would have affected petitioner in the way that Congress envisioned, and in the way that so many other firms were affected: petitioner would have reduced its releases of toxic chemicals. The additional toxic chemicals to which CBE and its members were exposed, as a result of petitioner’s noncompliance, is another injury in fact that petitioner inflicted on CBE.

B. CBE’s Suit Satisfies the Requirement of Redressability

For these reasons, it is beyond serious dispute that CBE was injured in fact. Even petitioner does not dispute that CBE’s injury is “fairly traceable” to petitioner’s failure to submit forms under EPCRA, rather than the actions of some third party. The only remaining issue is whether CBE’s injuries are “redressable” by the relief that CBE seeks.

¹⁴ The 1988-93 figures are reported in The Steel Company’s Reply Memorandum in Support of Its Motion to Dismiss, No. 95 C 4534 (N.D. Ill.), filed Oct. 19, 1995, Exh. B. The 1995 figure is contained in the Form R for that year that petitioner filed with the EPA. We have lodged a copy of that document with the Court and served it on petitioner.

1. a. The requirement of redressability has been developed and applied by this Court primarily in cases in which a plaintiff has sought an injunction against a government official or agency. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992) (plurality opinion); *Allen*, 468 U.S. at 757-61; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-76 (1982); *Simon*, 426 U.S. at 39-46. In such cases, this requirement serves a vital purpose: it ensures that courts will interfere with executive officials' performance of their duties only when such interference is necessary to prevent continued injury to the plaintiff. Otherwise, a plaintiff who suffered some form of injury in fact could, by asserting a connection between that injury and some government policy, use litigation as a way to enlist the judicial branch in supervising the legality of the actions of executive officials—a role far different from that contemplated by Article III. See *Valley Forge Christian College*, 454 U.S. at 473, quoting *United States v. SCRAP*, 415 U.S. 669, 687 (1973).¹⁵

This, however, is not a suit that “seek[s] a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties” (*Allen*, 468 U.S. at 761); rather, it is “a case brought * * * to enforce specific legal obligations where violation works a direct harm.” *Ibid.* In such cases, the Court has omitted any mention of redressability in stating the requirements of Article III and has required only what is plainly present here: “the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); see, e.g., *Havens Realty Corp.*, 455 U.S. at 372. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977); *Warth*, 422 U.S. at 501. The reason is that in such cases, there is no danger that the litigation seeks to give courts a general authority to police the legality of the actions of executive officials, since such officials are

¹⁵ That is why often “the ‘redressability’ analysis is identical to the ‘fairly traceable’ analysis.” *Allen*, 468 U.S. at 759 n. 24.

not parties to the case, and no danger of undue interference with the activities of private parties—so long as the plaintiff can show, as CBE can here, that the defendant against whom it seeks relief is the party who actually injured it, and that the relief sought is authorized by Congress.

b. Perhaps for this reason, the Court has consistently acknowledged the constitutionality of informer's actions, or qui tam actions, in which a private person sues another private person, seeking to compel the payment of a fine to the government plus a bounty of some sort—generally a percentage of the government's recovery—to the plaintiff. The bounty cannot be said to “redress” the plaintiff's injury; it is simply a reward for bringing suit. Indeed in the typical qui tam action, the plaintiff need not show any injury to himself at all, beyond the injury he suffers as an undifferentiated member of the public. Cf. *United States v. Richardson*, 418 U.S. 166 (1974). Nevertheless, “[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, had been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.” *United States ex rel Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943), quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

As early as 1805, Chief Justice Marshall remarked that “[a]lmost every fine * * * under a penal statute, may be recovered by a [private] action of debt as well as by information [filed by the government.]” *Adams, qui tam, v. Woods*, 6 U.S. 336, 341 (1805). And as recently as 1992, the Court went out of its way to avoid drawing into question such “case[s] in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff.” *Defenders of Wildlife*, 504 U.S. at 573. See also *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340 (June 16, 1997). This long-standing and consistent endorsement of the qui tam action is especially significant because, as the Court has said, the requirements of Article III are “not susceptible of precise definition” (*Allen v. Wright*, 468 U.S. at 751): to a large degree, they draw their content from tradition and “common understanding[s].” *Defenders of Wildlife*, 504 U.S. at 560.

CBE's standing follows a fortiori from the qui tam cases. As in those cases, the principal "redress" CBE seeks is a payment to the federal treasury. But CBE, unlike the typical qui tam plaintiff, can show a distinct and concrete injury to itself and its members, and it can show that the defendant inflicted that injury. It therefore has a far greater "warrant [for] invocation of federal court jurisdiction" (*Warth*, 422 U.S. at 498) than the qui tam plaintiff does.

The only difference between a citizen suit like CBE's and a traditional qui tam action—other than CBE's injury in fact, which makes this a far more appropriate form of litigation under Article III—is the kind of incentive Congress used to motivate plaintiffs to sue. In a citizen suit under EPCRA, a victorious plaintiff can recover the "costs of litigation" (42 U.S.C. § 11046(f)); the typical qui tam plaintiff receives a percentage of the government's recovery. But there is no basis for reading into Article III a limitation on the judgments Congress may make about the appropriate incentive scheme.

An award of the "costs of litigation" under EPCRA is made to the plaintiff, not to the attorney. The award is contingent upon the plaintiff's prevailing. The fact that the plaintiff recovers the costs of litigation if he prevails, but not if he loses, is surely enough to give the plaintiff "a personal stake in the outcome of the controversy" (*Flast v. Cohen*, 392 U.S. 83, 101 (1968), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)), and thereby "assure that concrete adverseness which sharpens the presentation of issues upon which the court * * * depends." *Simon*, 426 U.S. at 38 & n. 16, quoting *Baker*, 369 U.S. 204.¹⁶ EPCRA provides for "litigation costs," not just attorney's fees, so the citizen plaintiff himself will be compensated for resources spent on the litigation. Of course, the citizen plaintiff may not show a net financial gain, but that is true of any victorious civil plaintiff

¹⁶ Petitioner relies on *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990), and *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986), for the proposition that "awarding attorney's fees does not constitute sufficient interest in a case for Article III purposes." Pet. Br. 38. But neither case states such a sweeping, and implausible, proposition, and neither is apposite here. In *Lewis*, the case became moot during the course of litigation, and there was no longer a live dispute between the parties on the merits; the Court held that the interest in fees was insufficient to establish a con-

who finds that the amount of the judgment he has recovered (including the bounty, in a qui tam action) is equal to or less than the costs of litigation.

In fact, the differences between litigation costs and a percentage bounty suggest, if anything, that an award of litigation costs is a more rational way to provide an incentive for private parties to sue. That is because the payment is calibrated to the amount of time and effort that were expended in enforcing the law. A bounty might provide an inadequate incentive to bring a particularly complex suit, and might provide a windfall in an easy case. By contrast, the citizen suit provision of EPCRA, if properly administered, will always protect a victorious plaintiff from having to bear the litigation costs of enforcing the law and obtaining a payment into the federal treasury. The relative irrationality of a bounty, compared to a fee award, is no doubt why Congress has, in recent times, increasingly (although not exclusively) enacted citizen suit provisions, providing for the award of fees, instead of qui tam actions.

It is, in any case, difficult to see why the desirability of different incentive schemes should make a difference for Article III purposes. That is a choice that should be left to Congress. It would be pointless to conclude that Section 326 is unconstitutional as written, but would

tinuing Article III case or controversy. Here, of course, there is a continuing live dispute on the merits between the parties in this case: CBE claims that, among other things, petitioner is liable for civil penalties, and petitioner disagrees.

Diamond involved facts utterly unlike those present here. In *Diamond*, a party intervened in a lower court to defend the constitutionality of a state statute; the lower court invalidated the statute and awarded fees *against* the intervenor. When the state declined to seek review in this Court, the Court held that the intervenor had no cognizable interest, sufficient to satisfy Article III, in defending the constitutionality of the state law. In those circumstances, the intervenor's interest in having the award of fees vacated was not sufficient to satisfy Article III. See 476 U.S. at 70. CBE, unlike the intervenor in *Diamond*, is not relying on the provision for attorney fees incurred in prosecuting (or defending) the lawsuit to establish injury in fact; CBE has amply shown injury in fact from several other sources. Moreover, while the intervenor in *Diamond* had no cognizable interest in the merits of the case—he had no more authority to defend the constitutionality of the state statute than any member of the general public did—an Act of Congress grants CBE a right to pursue civil penalties against petitioner.

become constitutional if Congress provided, instead of litigation costs, a bounty—even a relatively small bounty of a kind that would be almost certain not to cover the costs of litigation. Indeed it would be highly paradoxical to conclude that a citizen suit like CBE's, where the plaintiff can show injury in fact inflicted by this defendant, is barred by Article III, even though a *qui tam* action brought by a "stranger"—an individual who can show no injury in fact—is allowed to proceed, just because Congress chose to award litigation costs instead of an arbitrary percentage bounty.¹⁷

2. Petitioner's contentions about "redressability" should be rejected for another reason as well. A redressability issue arises in this case, if at all, only because petitioner filed its delinquent forms in response to CBE's notice of intent to sue, thus making injunctive relief unnecessary. Had petitioner not ceased its unlawful conduct in this way, no one would deny that CBE's suit satisfied the requirements of Article III. Under a well-established line of cases, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Florida Chapter, Associated General Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993), quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

These cases, of course, usually involve litigation that has already begun. In such circumstances, the defendant's voluntary cessation of the unlawful practice does not render a case moot unless it is "absolutely clear" that "the allegedly wrongful behavior could not reasonably be expected to recur." *Vitek v. Jones*, 445 U.S. 480, 487 (1980), quoting *Phosphate Export Ass'n*, 393 U.S. at 203. In particular, the federal courts do not lack power to adjudicate such cases even if, as here, the defendant's cessation of wrongdoing has "ma[d]e

¹⁷ There is substantial historical material, which the Court has not yet had occasion to address, supporting the power of Congress to authorize suits in circumstances where standing would otherwise be lacking. These materials are canvassed in Berger, *Standing to Sue in Public Actions*, 78 Yale L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1269-82 (1961); Winter, *The Metaphor of Standing*, 40 Stan. L. Rev. 1371, 1394-1425 (1988); Sunstein, *What's Standing After Lujan?*, 91 Mich. L. Rev. 163, 168-179 (1992).

injunctive relief unnecessary." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203-04 (1968). See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33, 635-36 (1953).

Here Congress has, for compelling practical reasons, applied this voluntary cessation principle to conduct taken by the defendant in response to the notice of intent to sue, rather than in response to the filing of the complaint. There is no reason to doubt that Congress has the power to do this. Indeed, the Court's seminal case on the voluntary cessation rule anticipates this situation: "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform *especially when abandonment seems timed to anticipate suit*, and there is probability of resumption." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) (emphasis added).¹⁸

It of course does not follow that there should be a general judge-made "voluntary cessation" exception to standing doctrine, parallel to that for mootness. But by the same token, Article III should not be construed to bar Congress from applying a "voluntary cessation" principle to permit standing. Both standing and mootness are Article III doctrines (see, e.g., *Honig v. Doe*, 484 U.S. 305, 317 (1988)), so the voluntary cessation principle developed in the mootness cases must, of necessity, be consistent with Article III.¹⁹ Here, moreover, Congress had excellent reasons to afford a right to sue: as we have explained, otherwise Congress could not provide a 60-day notice period, which serves many useful purposes, without enabling firms like petitioner effectively to nullify citizen enforcement.

¹⁸ Cf. *Defenders of Wildlife*, 504 U.S. at 570 n.4 (plurality opinion) (emphasis added) (A "defendant * * * can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment)").

¹⁹ See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973) ("[Mootness is] the doctrine of standing set in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).").

This conclusion is not in tension with the principle of *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824), that "jurisdiction * * * depends upon the state of things at the time of the action brought, and * * * after vesting, it cannot be ousted by subsequent events." See, e.g., *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938); *Smith v. Sperling*, 354 U.S. 91, 93 n. 1 (1957). Of course, that principle refers only to the "ouster" of federal jurisdiction, not to its creation, and therefore has no direct application to the issue presented here. Perhaps more important, the Court has never suggested that the principle of *Mollan v. Torrance* is a constitutional principle, as opposed to a principle of statutory construction. Indeed it cannot be a constitutional principle, because mootness provides a clear example of "jurisdiction * * * ousted by subsequent events." See *Honig*, 484 U.S. at 317 (Article III requires that a case be "an actual case or controversy" at the time of its decision, not just "when suit was filed").

The relevant analogy, therefore, is not to the principle of *Mollan v. Torrance* but to Congress's power to prevent efforts to circumvent jurisdictional requirements. See, e.g., 28 U.S.C. 1359; *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969). Although Congress has not yet done so, there seems little doubt that Congress could, for example, prevent parties from defeating diversity jurisdiction by assigning a claim to a non-diverse individual in anticipation of litigation. See *Gentle v. Lamb-Weston, Inc.* 302 F. Supp. 161 (D. Me. 1969); *Grassi v. Ciba-Geigy, Ltd.*, 894 F. 2d 181 (5th Cir. 1990); *Miller v. Perry*, 456 F. 2d 63 (4th Cir. 1972). Here, similarly, Congress has prevented petitioner from defeating federal jurisdiction by actions taken in response to the notice of intent to sue.

3. The relief that CBE seeks also redresses the injury it suffered in a straightforward way: by punishing the party who inflicted the injury, and by preventing and deterring that party from inflicting any future injury on CBE and its members. Petitioner asserts that CBE is seeking to exercise "prosecutorial authority" (Pet. Br. 39). But CBE is not seeking to enforce the law against a wrongdoer chosen from the

population at large; it is seeking to punish a party whose illegal conduct directly injured CBE, and who, if it breaks the law again in the future, will injure CBE again.²⁰

a. The notion that a victim redresses a wrong and vindicates its own rights by punishing the wrongdoer—even if the victim does not materially profit from doing so—is as ancient and fundamental a notion of "redress" as can be found. This Court has, for example, specifically approved and award of nominal damages "not to exceed one dollar" to plaintiffs who suffer a violation of their rights but no compensable injury. *Carey v. Piphus*, 435 U.S. 247, 267 (1978). The purpose of such an award is to "vindicate[]" the plaintiff's rights and to ensure that "the law recognizes the importance to organized society that those rights be scrupulously observed" (*id.* at 266). CBE, which has suffered injury, has the same interest in obtaining the vindication of its own rights. And the request for civil penalties, as well as for other forms of relief, assures that there will be far more "concrete adverseness" between the parties here than there is in a suit where only nominal damages is at stake. *Simon*, 426 U.S. at 38 n. 16, quoting *Baker*, 369 U.S. at 204.

b. In addition, Congress determined that the imposition of civil penalties on petitioner would deter petitioner from future violations of EPCRA. As we have shown, petitioner's violations of EPCRA injured CBE and its members in precisely the way the statute is intended to prevent. Petitioner continues to conduct operations subject to EPCRA in the neighborhood where CBE's members live and work. If petitioner violates EPCRA in the future, those violations will again directly harm CBE and its members. By deterring such violations, the civil penalties will redress future harm to CBE in the same way that an injunction would.

Deterrence in this case rests on the common sense notion that a wrongdoer who has paid a penalty is more likely to stay within the law, in the future, than a wrongdoer who has escaped punishment. It

²⁰ In this respect, this case is wholly unlike *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); here, if petitioner again violates the law, there is not just a "real and immediate threat of injury" to CBE and its members (*id.* at 103) but a virtual certainty.

is entirely reasonable for Congress to make this judgment the basis for the EPCRA citizen suit provision. Congress should be permitted "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" (*Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring)). A determination that petitioner will be less likely to injure its neighbors in the future if it is subject to civil penalties today is precisely the "chain of causation" that Congress has "articulate[d]" here.

Indeed, Congress has made this judgment in connection not just with EPCRA but with the amendments to the citizen suit provision of the Clean Air Act, which permits citizen suits against parties who came into compliance before suit was brought: "The assessment of civil penalties for violations of the Act is necessary for deterrence, restitution, and retribution." S. Rep. No. 101-223, 101st Cong., 2d Sess. 372-75 (1989) This does not amount to saying that Congress could simply authorize any person to enforce the law against any wrongdoer: CBE will be the victim if petitioner violates the law again. By imposing penalties on petitioner, CBE is seeking to avert future injury to itself, and Congress reasonably concluded that such penalties will be an effective deterrent.

c. Finally, in this case CBE sought not just civil penalties and litigation costs but declaratory and injunctive relief against petitioner. See J.A. 11. The declaratory judgment will foreclose petitioner from engaging in unlawful conduct in the future. Cf. *Samuels v. Mackell*, 401 U.S. 66 (1971). The injunction, which would entitle CBE to inspect petitioner's facility and records, will directly deter future violations.

As we have said, under well-established principles, such a request for prospective relief cannot be defeated just because petitioner has, under threat of litigation, desisted for now from its unlawful conduct. "[P]redictable 'protestations of repentance and reform'" (*Gwaltney*, 484 U.S. at 67, quoting *Oregon State Medical Society*, 343 U.S. at 333) do not bar equitable relief unless the "defendant [can] demonstrate that it is 'absolutely clear' that the allegedly wrongful behavior could not reasonably be expected to recur" (*Gwaltney*, 484 U.S. at 66, quoting *Phosphate Export Assn*, 393 U.S. at 203)—a showing that petitioner cannot possibly make here.

4. The relief that CBE seeks also compensates CBE for the injury petitioner inflicted on it, in two important respects.

a. The award of litigation costs, in addition to providing CBE with a stake in the action analogous to the qui tam plaintiff's bounty, also redresses an important element of CBE's injury. Because EPCRA is an informational statute, the award of litigation costs under EPCRA does not function in the way such an award generally does. The Court has said that "[a]s a general matter," a claim for litigation costs "is not part of the merits of the action" because it "does not remedy the injury giving rise to the action" (*Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)). But that is not the case here; here, an award of litigation costs will compensate CBE, in part, for the injury that petitioner's unlawful conduct inflicted on it. The award of litigation costs is therefore *not* "wholly unrelated to the subject matter of the litigation" (*Diamond v. Charles*, 476 U.S. 54, 70 (1986)). Petitioner's wrongful conduct kept from CBE information that CBE was entitled to receive, and as a result CBE had expend its own resources to conduct a more expensive independent investigation, piecing together from other public sources of information that should have been readily available under EPCRA. CBE's independent investigation served the very purpose of EPCRA—"to provide the public * * * with important information on the hazardous chemicals in their communities." H.R. Rep. 253, pt. 1 at 59.

If CBE prevails in this action, the costs of that investigation will be recoverable under the litigation costs provision of EPCRA. See *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1189 (3d Cir. 1995). As this Court explained, in interpreting the litigation costs provision of the Clean Air Act, 42 U.S.C. 7604(d)—a provision indistinguishable, for these purposes, from the EPCRA litigation costs provision—fees should be awarded for work that is "'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware Valley Citizen's Council*, 478 U.S. 546, 561 (1986), quoting *Webb v. Board of Ed.*, 471 U.S. 234, 243-44 (1985). The resources CBE expended in its investigation of petitioner were not only "useful" and "ordinarily necessary" but indispensable; without that investigation CBE would have had no basis to issue its notice of intent to sue, which was of

course a jurisdictional prerequisite to this action (see *Hallstrom*, 493 U.S. at 31).

If, therefore, CBE prevails in this litigation, it will receive a sum of money that will compensate it for a significant part of the injury that petitioner inflicted on it. This is a straightforward form of "redress," plainly adequate to satisfy Article III.

b. In addition, citizen suits under EPCRA and other environmental statutes, like other litigation, often do not proceed to judgment but are settled. Under well-established EPA guidelines, those settlements—so-called Supplemental Environmental Projects (SEPs)—can provide benefits to the individuals injured by the defendant's violation of EPCRA. See Environmental Protection Agency, Interim Revised Supplemental Environmental Projects Policy, 60 Fed. Reg. 24856 (May 10, 1995). Many lower courts have approved SEPs as part of consent decrees settling citizen suits, including citizen suits under EPCRA. See, e.g., *Atlantic States Legal Foundation v. Whiting Roll-Up Door Mfg. Corp.*, 38 BNA Env't Rep. Cases 1426, 1428 (W.D.N.Y. 1994); *Atlantic States Legal Foundation v. Com-Tek*, 22 BNA Env't Rep. (Current Developments) 535 (June 28, 1991).

A SEP that resolved an EPCRA suit might, for example, provide for the defendant to take steps to reduce its use or improve its handling of toxic substances—the sort of steps the defendant might have been compelled to take, by public pressure, if it had made the disclosures required by EPCRA. Like any settlement, a SEP might not compensate the plaintiff perfectly for the injury that the defendant inflicted. But the redressability requirement does not require perfect compensation; it only requires that the prospect of redress be "likely" and not purely "speculative." The prevalence of SEPs, and their recognition by the EPA, establish the availability of this form of redress and therefore satisfy Article III.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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